IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-435

IMPERIAL IRRIGATION DISTRICT, ET AL., *Petitioners,*

v.

BEN YELLEN, ET AL., *Respondents.*

REPLY BRIEF OF PETITIONER IMPERIAL IRRIGATION DISTRICT

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I. Jurisdiction: The Amorphous Status of the Solicitor General in This Case.

The Solicitor General has filed a brief in support of Respondents.[1] He does not say whether he is appearing as amicus curiae, or believes that the United States is a party in the Supreme Court, notwithstanding its considered decision not to appeal from the ad-

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[1] References to the Solicitor General's brief appear here as "S.G. Br. —," to the brief of Dr. Yellen, *et al.*, as "Resp. Br. —," to the District's initial brief as "Dist. Br. —," to the Consolidated Appendix as "A. —," and to the Appendix to Imperial Irrigation District's Petition for Certiorari, as "Pet. App. —." The appendix to the District's petition contained 248 pages, and the pagination of the Appendix to this reply brief therefore begins with page 249a.

verse judgment of the District Court.[2] If the United States is a party, it is only so because somehow it can piggy-back on the appeal of Dr. Yellen, *et al.*, who were permitted by the Court of Appeals to intervene, in order to appeal from the judgment against the United States. The Yellen Group were not parties prior to judgment in the District Court, where the United States was plaintiff, the District was defendant, and the landowners and the State of California were the only intervenors.

Even if the appeal of an intervenor after judgment is found to resuscitate the expired case of the United States, which otherwise ended in the District Court, the Solicitor General faces two other hurdles before he can be heard here as counsel for a party. If the Yellen group lacked standing to appeal (see Dist. Br. 75-83), or lost that standing while the case was pending in the Circuit Court (*id.*, at 83-85), the piggy-back ride fails, and the United States is not here as a party; it remains bound by the res judicata effect of the District Court judgment. So also if Respondents are found to be bound by the 1933 in rem *Hewes* judgment. Dist. Br. 69-73.

Apparently recognizing this, the Solicitor General goes to extreme lengths to support the standing of Respondents, and to aid their attempted escape from the res judicata effect of the judgment in the *Hewes* case.

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[2] See Solicitor General Griswold's memorandum, *infra* at 249a, explaining in detail his decision not to appeal. 28 C.F.R. § 0.20(b) would appear to vest final authority in the Solicitor General to make such a decision, subject to the Attorney General's general supervision. This case presents the unique spectacle of a private party, who is suing in his own financial interest, not on behalf of a class, seeking to overrule the decision of the Solicitor General not to appeal a judgment against the United States, a decision which Solicitor General Griswold concluded was required by principles of good government, and by the responsibilities of his office.

The Solicitor General apparently believes that Dr. Yellen and his 122 colleagues have standing because Congress, in enacting the Project Act, intended them to have this windfall. (It must be remembered that this is not a class action.) But the very size of the honey pot—several hundred thousand dollars of increase of net worth to each lucky buyer—suggests that Dr. Yellen, *et al.*, might have literally millions of competitors. This number might shrink if the Secretary could, and were of a mind to, limit the eligible buyers to residents of Imperial Valley. Its population is about 75,000. The present Secretary is on record as favoring a lottery. In such case, the chances of these particular 123 landowners for success in such a sweepstake is a rather shaky underpinning for standing to litigate the water titles of the District's landowners and the District's responsibilities as trustee of those water rights, and an even wobblier foundation for the derivative standing of the Solicitor General to reverse a District Court judgment from which the United States decided not to appeal.

II. Solicitor General Griswold's Decision Not to Appeal from the District Court's Judgment

In Appendix A to this brief we reprint the full text of Solicitor General Griswold's detailed "Memorandum for the Files," dated April 8, 1971, giving his reasons for not appealing from Judge Turrentine's decision.[3] Solicitor General Griswold concluded, after a thorough discussion:

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[3] Appendix B is Secretary Morton's letter to the Attorney General, and Appendix C is Solicitor Melich's memorandum, both making the same recommendation as Solicitor General Griswold. This material became available to us for the first time on February 20, 1980, by publication in the Congressional Record at S1682.

"To me, the essence of this case is essentially a question of good administration of the government. Is it sound to have a government system in which official determinations are made, on questions which are at least debatable, are then outstanding for more than 30 years,[4] and are then decided another way by a succeeding governmental official? This does not strike me as good administration, or good government. Of course, life is filled with uncertainties, including commercial life and the ownership of property. But one of the functions of government is to provide for stability and to make it possible for the people to rely on situations which have been determined, and where they make commitments on the basis of that determination."

III. The Ultimate Issue, as Disclosed in the Solicitor General's Brief, Is Whether Congress, in Enacting the Project Act, Intended That Lands in Excess of 160 Acres per Owner Should Be Stripped of the Value of Their Present Perfected Water Rights.

The ultimate issue on the merits, as disclosed by the Solicitor General's brief, is this:

Notwithstanding the opinion and decrees of this Court in *Arizona* v. *California,* which construed the Boulder Canyon Project Act as requiring that present perfected rights shall not be impaired and directing the Secretary to deliver water in satisfaction of such rights, the Solicitor General and Respondents would now re-construe the Project Act as mandating that lands in excess of 160 acres per owner, having present perfected rights, must be sold at desert land prices, or

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[4] Our footnote: Solicitor Griswold was referring to Secretary Wilbur's determination that acreage limitations were not applicable to lands in Imperial Valley having vested water rights.

else, being denied water by the Secretary of the Interior, revert to desert. *The value of the water right is reduced to zero if the value of irrigated land is arbitrarily reduced to that of desert land. The obliteration of the value of the water right—which is all that gives worth to land in the desert—is about as complete an impairment of that right as could be envisioned.*

The possibility that Dr. Yellen, *et al.*, will be the lucky purchasers of cultivated land at desert land prices is the basis of their supposed standing to appeal the District Court judgment against the United States. The Solicitor General seems unconcerned by a 1979 opinion of the Interior Department's Solicitor to the effect that, under the law as it now stands, Dr. Yellen and his colleagues could at once resell, at full market value, the lands which the Project Act, construed as the Solicitor General construes it, requires their present owners to sell for a pittance. See Dist. Br. 9, 74.

Respondents and the Solicitor General are quite explicit in their description of this multi-million dollar raid on present perfected rights.[5] The Solicitor General says: "Respondents reside in the Imperial Valley and desire to purchase the excess lands for farming, but they cannot afford the current market price of $1200

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[5] The Solicitor General thinks the acreage of excess lands is approximately 105,000 acres. S.G. Br. 4 n. 2. The Court of Appeals called it 233,000 acres, Pet. App. 69a, and cited Respondents' use of the same number, *id.*, at 73a n. 6. Respondents now say the excess lands amount to some 265,000 acres. Resp. Br. 167. The differences do not affect the principle involved, which is whether lands to which present perfected rights are appurtenant shall be required to be sold as though they were desert, which they ceased to be when water was brought to Imperial Valley at private expense, commencing in 1901.

to $1400 per acre. If the excess-acreage limitation is applicable, however, excess lands will no longer receive project water unless, as provided in Section 46, the owners execute valid recordable contracts to sell such lands at prices that do not reflect the use of water from the Boulder Canyon Project. The value of these lands, *appraised as dry lands,* is a fraction of their value as irrigated or potentially irrigable lands, and has been estimated to be only $25 to $50 per acre (emphasis added)." S.G. Br. 22. And later: "Hence, in order for their excess lands to continue to receive project water, landowners would be required to agree to sell those lands at prices that reflect their *'value as dry land rather than as irrigated or potentially irrigated land'* (emphasis added; citations omitted)." S.G. Br. 78. He continues, in support of Dr. Yellen's assertion of standing, "in any event, respondents' affidavits, fairly read, indicate that they would seek to purchase land at $25 to $50 per acre, which was their estimate of the appraised value of the land without reference to project water." S.G. Br. 85 n. 49. Respondents believe that "[i]f the decision of the court of appeals is affirmed, approximately 265,000 acres of excess lands will be sold . . . at below market prices." Resp. Br. 167. "The execution of recordable contracts will definitely result in the sale of over a quarter million acres of some of the finest farm land in the world at below market prices." Resp. Br. 170. They say that since the "ex-contract [*i.e.,* desert land] market value of farm land in the Imperial Valley was approximately $25 to $50 per acre at the time respondents sought leave to intervene, while irrigated lands had a value of $1,200 to $1,400 per acre, it is unlikely that respondents would have any difficulty obtaining sufficient funds

either through private or government lending sources." Resp. Br. 169. "The excess lands have very little value without the subsidized water." Resp. Br. 171. See Dr. Yellen's affidavit of March 14, 1971, at Pet. App. 245a.

Using Respondents' figures, the windfall to the speculator (even if the 1971 value of cultivated land had not escalated) would be $216,000 per 160 acres or, if the buyer is married, $432,000 per 320-acre farm.[6] This is the value of the lost water right, the difference between the value of cultivated land and desert land.[7]

If Respondents prevail, the aggregate loss to the present landowners (and windfall to the purchasers), according to Respondents' figures,[8] will exceed three hundred million dollars, or 12 times the cost of the All-American Canal.

Respondents say that they and the government are in agreement that they are the "beneficiaries intended by Congress." Resp. Br. 147. It matters not whether Respondents keep the expropriated lands or

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[6] ($1,400—$50)/acre x 160 acres or 320 acres.

[7] The Court will not be misled by references to recovery of the value of improvements. The speculative gain to the buyer is the difference between the values of land with and without water. Dr. Yellen, *et al.*, would pay for desert land, but get irrigated land, and be free to sell it at once as irrigated land if Respondents prevail. See Dist. Br. 73-74.

[8] According to these figures, the least that present landowners could lose if Respondents prevail is 265,000 acres x ($1,200—$50)/acre, or $304,750,000. It should be noted that the actual loss would no doubt be much larger, because, while the value of desert land has remained constant, the value of irrigated land in Imperial Valley has increased substantially since Dr. Yellen executed his affidavit in 1971.

sell them; several hundred millions of dollars of net worth would be transferred. That is the object of the suit. The Solicitor General and the Yellen group, while conceding that the Secretary has no legal power to compel the owners of excess lands to sell their cultivated lands as desert, apparently believe that these owners can be coerced into doing so. Resp. Br. 172-173.

The Solicitor General, as though to justify his partisanship, emphasizes the benefits received by the District from the Project Act as though the District was the sole beneficiary. S.G. Br. 34 n. 18. This was manifestly not the case. The national character of the Project Act was repeatedly emphasized by this Court in *Arizona* v. *California*:

> "[T]he question of each State's share of the waters of the Colorado and its tributaries turns on the meaning and the scope of the Boulder Canyon Project Act passed by Congress in 1928. That meaning and scope can be better understood when the Act is set against its background—the gravity of the Southwest's water problems; the inability of local groups or individual States to deal with these enormous problems; the continued failure of the States to agree on how to conserve and divide the waters; and the ultimate action by Congress at the request of the States creating a great system of dams and public works nationally built, controlled, and operated for the purpose of conserving and distributing the water.
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> * * * * *
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> "The prospect that the United States would undertake to build as a national project the necessary works to control floods and store river waters for

irrigation was apparently a welcome one for the basin States.

* * * * *

"Before the Project Act was passed, the waters of the Colorado River, though numbered by the millions of acre-feet, flowed too haltingly or too freely, resulting in droughts and floods. The problems caused by these conditions proved too immense and the solutions too costly for any one State or all the States together. In addition, the States, despite repeated efforts at a settlement, were unable to agree on how much water each State should get. With the health and growth of the Lower Basin at stake, Congress responded to the pleas of the States to come to their aid. The result was the Project Act and the harnessing of the bountiful waters of the Colorado to sustain growing cities, to support expanding industries, and to transform dry and barren deserts into lands that are livable and productive.

"In undertaking this ambitious and expensive project for the welfare of the people of the Lower Basin States and of the Nation, the United States assumed the responsibility for the construction, operation, and supervision of Boulder Dam and a great complex of other dams and works (footnote omitted)." 373 U.S., at 551-552, 555, 588-589.

Without these works the Upper Basin States could not have used water from the Colorado River at all, because the lower users had already appropriated the natural flow, particularly during the low flow summer months, the same months comprising the growing season in the Upper Basin. The works constructed pursuant to the Project Act have made water available for the Central Arizona Project and for the coastal regions of Southern California. All users below Hoover Dam

in both California and Arizona have received the same benefits as the District, namely, regulated flow and relief from flooding. None of the other owners of present perfected rights in Arizona and California has been asked to pay any part of the costs of the dam and power plants.

IV. The Most Egregious Error of the Solicitor General Is in Attempting to Write "Present Perfected Rights" Out of the Project Act and Out of This Court's Opinion and Decrees in *Arizona* v. *California*.

A. Section 6 of the Project Act, in requiring the "satisfaction" of present perfected rights, and Article VIII of the Compact, in providing that present perfected rights are "unimpaired," expressly determine eligibility, not just priority.

The Solicitor General argues that the doctrine of present perfected rights was merely designed to set an order of priority in the allocation of water under the Project Act to those who are entitled to receive it, but does not decide the antecedent issue of eligibility to receive that water. S.G. Br. 13. Thus, it is said, "section 6 is simply immaterial" to Congress' determination that excess lands shall not receive federal water.[9] The notion seems to be that § 6 of the Project Act throws the ball, but § 46 of the 1926 Omnibus Adjustment Act determines who can catch it. This is the crux of the Solicitor General's case. It is a wholly mistaken concept, for several interrelated reasons.

(1) The doctrine of present perfected rights is not simply a scheme which sets "an order of priority in the

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[9] In view of the obvious differences between the Solicitor General's concept of the present perfected rights doctrine, and the concept expressed by this Court in *Arizona* v. *California*, we reproduce in Appendix D to this brief, for ready reference, the language that the Court actually used on the 16 occasions on which it referred to this subject.

allocation of water under the Project Act." It is a doctrine which confirms pre-existing property rights unimpaired.

The District's present perfected rights are those created by the irrigation of the very lands now in jeopardy, to which those rights are appurtenant as real property, under both state and federal law. Dist. Br. 32-38. The landowners, as the equitable owners of the present perfected rights, have a constitutionally protected interest therein. See *Merchants' National Bank of San Diego* v. *Escondido Irrigation District,* 144 Cal. 329, 334, 77 P. 937, 939 (1904). The District, as the legal owner and trustee, has no power to take perfected rights from the present owners of the lands to which they are appurtenant, and give them to other beneficiaries or transfer their appurtenancy to other lands (even assuming, contrary to fact, that there were other lands in the District on which that water could be applied).

(2) The Secretary has no authority, under the statute or the two decrees in *Arizona* v. *California,* to determine the "eligibility" of anyone to receive water subject to present perfected rights. This Court's opinion and decrees in *Arizona* v. *California* construed the Project Act as excluding present perfected rights from the Secretary's power to allocate stored water,[10] and its decrees confirmed their quantity, acreage served, and priority dates. He cannot do indirectly what the opinion and decrees prohibit him from doing directly, *i.e.*, reallocate water in which present per-

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[10] 373 U.S., at 581, 584, 594; Art. II(B)(3) of the 1964 decree in *Arizona* v. *California,* 376 U.S. 340, 342. See also § 301(b) of the Colorado River Basin Project Act, 82 Stat. 887, 43 U.S.C. § 1521, implementing that article.

fected rights are decreed, by the device of vetoing eligibility of the owners of decreed acreage. Present perfected rights never belonged to the United States. They are not grants from the United States, to which the government can attach conditions, as in sales of water or grants of public lands, or licenses for the use of navigable streams. The Project Act does not authorize the United States to acquire title to them, but, to the contrary, in § 6 requires them to be served, unimpaired.

The Secretary has nothing to give, no ball to throw. Instead, he is "fettered," in the language of the Court in *Arizona* v. *California,* 373 U.S., at 581, and the Project Act requires that he honor present perfected rights in quantities and with priorities that are wholly outside any contractual allocation scheme, and are determined by state law, adopted as federal law. 373 U.S., at 594. The Solicitor General would reduce their status to that of rights sold by the Secretary, as in *Ivanhoe* (see *infra* at 48 for a discussion of that case).

(3) Even assuming, *arguendo,* that Congress in 1926 intended to cut off present perfected rights (without saying so) by enacting § 46 of the Omnibus Adjustment Act, the fact is that Congress, two years later, in enacting §§ 6, 8, and 13 of the Project Act, directed just the opposite result, *i.e.,* that such rights remain unimpaired, be appurtenant to the land irrigated, and be satisfied by the Secretary's delivery of stored water. There is nothing in the Project Act or this Court's opinion or decrees in *Arizona* v. *California* which indicates that any of the District's decreed acreage of 424,145 acres is to revert to desert land values if ownership remains in the hands of those who paid the cost of bringing 2,600,000 acre-feet of water annually to irrigate that

acreage before there was any Project Act or, for that matter, any Omnibus Adjustment Act.

(4) The concept that § 6 does not determine eligibility deprives this Court's decrees in *Arizona* v. *California* of finality. In 1979—26 years after the litigation in *Arizona* v. *California* commenced and 16 years after this Court's opinion in that case—the present perfected rights in Arizona, California and Nevada were finally (we thought) adjudicated. 439 U.S., at 419. In arguing that § 6 of the Project Act does not in any way determine eligibility to receive water, the Solicitor General in effect is saying that the Secretary can undo the Court's decree. Article II(B)(3) of the 1964 decree and § 301(b) of the Colorado River Basin Project Act do not contemplate that in years of shortage, the Secretary can bypass owners of present perfected rights by determining that they are ineligible to receive water. Inasmuch as this Court held in *Arizona* v. *California* that Congress, in ordering the Secretary to deliver water in satisfaction of present perfected rights, excluded those rights from his authority to allocate water, it follows that the same mandate in §§ 6, 8, and 13 denied him authority to do this indirectly by withholding water from any of the 424,145 acres to which the decreed rights are appurtenant. This exclusion is recognized by the "except as otherwise herein provided" clause of § 14.

The whole notion that the Project Act intended that the value of present perfected rights shall be impaired in transit between the river and the land is bizarre. So also is the notion that lands in excess of 160 acres per owner, to which such rights were appurtenant on June 25, 1929, have lost those rights because the ownership of the land has not changed since that

date. These two concepts are inherent, however, in the Solicitor General's idea that § 6 of the 1928 Project Act gives, but § 46 of the 1926 Omnibus Adjustment Act takes away. Or, to put the two acts in chronological sequence, the relationship is that the 1926 Act took away in advance the assurance against impairment that the Project Act gave two years later. The Court is thus asked to believe that Congress, in the later act, did not mean what it said.

(5) The notion that § 6 does not determine eligibility is wholly at odds with the legislative history of §§ 8 and 13 of the Project Act. Congress was told by Delph Carpenter, "Father of the Compact," that Article VIII, enjoining the "impairment" of present perfected rights, was inserted in the Compact specifically to protect landowners in Imperial Valley. Dist. Br. 27. Article VIII would not have protected landowners in Imperial Valley if it did not confirm their eligibility to receive water.

B. Neither the Solicitor General nor Respondents cites any affirmative legislative history to support their contention that § 14 was intended to incorporate acreage limitations.

Unable to produce a single express statement in the legislative history that § 14 was intended to incorporate acreage limitations on private lands having vested water rights in the Colorado, the Solicitor General and Respondents seek to establish such an intention by implication.[11]

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[11] The Solicitor General refers to statements by Congressman Swing and Secretary Work which he believes support the notion that § 14 was intended to incorporate the excess land provisions of the reclamation law. However, examination of these statements and the context in which they were made reveals that they had

The Solicitor General's premise is that, since the same Congress that enacted the Omnibus Adjustment Act of 1926 considered the third Swing-Johnson bill, it must have had the 1926 Act in mind when it included what is now § 14 in that bill. This premise is refuted by the legislative history of both bills. *No one in either House ever mentioned § 46 of the Omnibus Adjustment Act during the debate on either the third or fourth (final) Swing-Johnson bills.* Congress obviously did *not* have the recent enactment of that act in mind in considering the Swing-Johnson bills.

The Omnibus Adjustment Act of 1926 originated as special legislation to grant relief to the settlers of 20 reclamation projects. Treated as emergency legislation by its proponents, it was pushed through Congress at an accelerated pace. As one member stated, "I want to say for myself, and perhaps for some others, that

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nothing whatever to do with acreage limitations. Mr. Swing's statements were only to the effect that the House bill, which contained an acreage limitation, and the Senate bill, which did not, were similar. They *were* similar, but they had important differences, and, indeed, Congressman Swing's statements were made during an explanation of certain of those differences relating to recovery of cost and power generation. See 70 Cong. Rec. 831-837 (1928). Secretary Work's statement was to the effect that the "sale" of water under the Project Act would be pursuant to Warren Act contracts. This statement was made in a letter to the House Committee on Irrigation and Reclamation, in the context of a discussion of repayment of costs. Moreover, in subsequent testimony before that Committee, the Commissioner of Reclamation stated explicitly that sale of water under Warren Act contracts pursuant to the Project Act would not result in acreage limitations. *Colorado River Basin: Hearings on H.R. 6551 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess., pt. 1 at 32-33 (1926).

we do not pretend to know much about the details of this legislation. . . . We are accepting this bill largely upon faith; we are accepting it upon our confidence in the chairman of the committee. . . ." 67 Cong. Rec. 8640 (1926).

Section 46 was part of a package of amendments to the administrative section of the bill offered by Congressman Cramton, after the bill was reported by the House Committee on Irrigation and Reclamation, which were accepted by the Committee prior to floor consideration of the bill. 67 Cong. Rec. 8544-8545 (1926).

When the House considered H.R. 10429 on May 3, 1926, most of the debate concerned the reasons for the failure of these particular projects, and the need for assurances that this legislation would make these projects economically viable once again. The only aspect of § 46 that was discussed was the sentence concerning the authority of the Secretary to enter into agreements with States for the selection of settlers. H.R. 10429 was passed by voice vote on May 3, 1926, without any discussion about the content or the type of contracts required by § 46. 67 Cong. Rec. 8640 (1926).

The Senate Committee on Irrigation and Reclamation reported H.R. 10429 on May 14, 1926, after making several technical changes and only a few substantive changes. An attempt to bring up the bill for consideration as soon as it was reported was defeated because few members were fully aware of the contents of the bill. *Id.*, at 9426. Nevertheless, it passed by voice vote without debate three days later. *Id.*, at 9509. The House agreed to the Senate amendments on May 18, 1926. *Id.*, at 9646.

The pending Swing-Johnson bills were never mentioned. And, as Under Secretary Carver convincingly pointed out in his criticisms of the Barry opinion (*infra* at 34), § 46, in its introductory language about the attraction of settlers to new projects, would lead the reader to assume that the settlement of new lands was the subject of the reference to new projects in the land limitation clause. It would not be suspected (and no one ever said during debate on either the 1926 Act or the Swing-Johnson bills) that the subject matter of § 46, instead, was the uprooting of areas long since settled, as in the case of Imperial Valley.

Furthermore, it is clear that the House Committee on Irrigation and Reclamation, which reported out both the bill that became the Omnibus Adjustment Act of 1926 and the third Swing-Johnson bill, did *not* consider § 14 of the Project Act as incorporating by reference § 46 of the 1926 Act, because the Committee added a new section to the Swing bill which specifically imposed a land limitation on private lands. Dist. Br. 42. (This new section survived in the fourth Swing bill until the Senate excised it by substituting and enacting the Johnson bill, which contained no such provision. Dist. Br. 42-44.) No member of either House at any time suggested, on the floor, in committee, or in a committee report, that § 14 had the effect of incorporating by reference the acreage limitation of the 1926 Act (or any other acreage limitation law) on private lands covered by present perfected rights. Dist. Br. 45-46.

In contrast to the absence of any affirmative legislative history supporting the contention that § 14 was intended to incorporate the excess land provisions of

the reclamation law are the following specific instances of affirmative legislative history relied on by the District (Dist. Br. 38-46):

(i) The explicit testimony of the author of § 14 (Congressman Swing) that a bill containing that provision did not impose acreage limitations;

(ii) The explicit testimony of the Commissioner of Reclamation that a bill containing § 14 did not impose acreage limitations;

(iii) Five unsuccessful efforts in the Senate (three on the floor and two in committee) to place an express acreage limitation provision in bills containing § 14 language;

(iv) The amendment of a House bill containing § 14 language specifically to include an express acreage limitation;

(v) The repeated statements on the Senate floor by opponents of the Project Act that bills containing the § 14 language did not contain acreage limitations.[12]

The Solicitor General and Respondents seek to explain away the repeated unsuccessful efforts of Sen-

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[12] Respondents' statement that "[o]bjections of Senators Hayden and Ashurst were not based upon the purported failure to provide for the 160-acre limitation," Resp. Br. 133, is obviously in error. See, *e.g.*, 70 Cong. Rec. 289 (1928), where Senator Ashurst stated that he objected to a bill containing the § 14 language but no express acreage limitation provision because:

> "[T]he bill authorizes the expenditure of millions of dollars of Federal funds to irrigate lands owned largely by private-land speculators in California in units in excess of 160 acres."

As the District Court said: "[t]he statements of Senators Phipps, Hayden and Ashurst recur too frequently and are too pointed to be disregarded." Pet. App. 100a.

ators Phipps, Ashurst and Hayden to add to the Johnson bills a land limitation on private lands (at a time when the language of § 14 was in the bill), on the ground that, after all, these Senators were in the minority in opposing the Project Act. This Court, in *Arizona* v. *California,* gave short shrift to the same argument, directed against the same Senators in the same debates:

> "We recognize, of course, that statements of opponents of a bill may not be authoritative [citation omitted], but they are nevertheless relevant and useful, especially where, as here, the proponents of the bill made no response to the opponents' criticisms." 373 U.S., at 583 n. 85.

Senators Hayden, Phipps and Ashurst were not exactly back-benchers. The Court, in the immediately preceding footnote, referred to a statement of Senator Hayden as the "remark of a man so knowledgeable in western water law" (a remark which the Court construed as recognizing state law as setting the order of priorities of present perfected rights). As the Court knows, he served in Congress for 50 years, from the admission of Arizona to the Union until shortly before his death. In the 70th and decisive Congress, Senator Phipps was Chairman of the Committee on Irrigation and Reclamation that reported out the Johnson bill, S. 728, which was enacted without an acreage limitation in substitution for H.R. 5773, which contained one. He had also been Chairman in the 69th Congress, when the Committee reported out the bill (H.R. 10429) which became the Omnibus Adjustment Act of 1926. If he thought that the § 14 language in the Johnson bill incorporated by reference § 46 of the 1926 Act, he would surely have said so, as this would have made

quite unnecessary his own land limitation amendments to the Johnson bill in the 69th Congress, and his substitute bill in the 70th Congress. Dist. Br. 42-46. He and Senator Ashurst, the ranking Democrat on the Committee (later Chairman of the Committee on the Judiciary), were in command of the allocation of time for debate on the Swing-Johnson bills in the 69th and 70th Congresses. Senators of the stature of Hayden, Ashurst and Phipps are listened to.

C. Respondents' contention that the "redistribution" problem will not arise because landowners will surely sell their excess land is (1) contrary to reason, (2) devoid of evidentiary support, and (3) contrary to experience in the reclamation program.

In holding that § 46 applies to deliveries from the All-American Canal to the District, the Court of Appeals reasoned that the District's present perfected rights would not be impaired by the application of § 46 because the District could simply "redistribute" the water withheld from excess lands. Pet. App. 34a.

In its brief, the District pointed out that it is physically impossible for the District to redistribute water withheld from excess lands, because all irrigable land within the District is already under irrigation; there is simply no place within the District's borders that water withheld from excess lands can be put to beneficial use. Consequently, if § 46 is applied, present perfected rights will be impaired to the extent that water subject to such rights is withheld from delivery and not put to beneficial use.

The United States' brief is silent on the problem of redistribution.

Respondents Yellen, *et al.*, argue that the redistribution problem will not arise because landowners in the

District will surely sell their excess lands when § 46 is applied, and upon such sale the lands will be eligible to continue receiving water. Resp. Br. 30, 172. Indeed, Respondents Yellen, *et al.*, label as "pure sophistry" any notion that, if § 46 is imposed, the Secretary will deliver less than the decreed quantity of water to less than the decreed quantity of land. Resp. Br. 105.

Yet plain common sense suggests that landowners will not sell excess lands at the prices suggested by Dr. Yellen even if denied water for those lands. If acreage limitations are applied to Imperial Valley, landowners will receive project water for 160 acres whether or not they sell their excess lands. And if they can only get $25 to $50 per acre for excess lands—2% to 4% of its value—as Dr. Yellen indicates in his affidavit, why should they sell? Even if the land had no value for purposes other than farming, and even if water were not available except through the All-American Canal, it is doubtful that landowners would sell their excess lands for a nominal sum—in effect, give such lands away—since they would get project water for 160 acres in any event.

The obvious alternative is to wait for a better day. The Solicitor General himself says (S.G. Br. 56 n. 29) that "Congress is the branch of government best suited to settle the excess-acreage question in a manner that fairly takes account of the wide range of competing interests, both public and private, at issue in this case," and calls attention to S. 14, 96th Congress, which, among other things, "would exempt the Imperial Valley from the excess-acreage limitation," and has passed the Senate. S.G. Br. 55 n. 29. (He neglects to say that the Secretary reported adversely on this exemption, and testified against it.) Landowners deprived of wa-

ter would logically wait for legislation, in some new administration, as a better alternative to selling long-cultivated lands as desert, losing 96 to 98 percent of the value of their excess lands.

Moreover, the District would face a serious legal and financial problem: could it lawfully collect assessments from the owners of lands to which it is prohibited from delivering water, perhaps amounting to more than one-half the acreage in the District, according to Respondents' figures?

Indeed, there was no finding by the District Court to the effect that landowners in the District would in fact sell their excess lands if denied project water for those lands, and no evidence in the record to support such a finding.[13]

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[13] It is true that Respondents Yellen, *et al.*, suggest otherwise. They refer to testimony before Congress by Imperial's Chief Counsel, Harry W. Horton, where Mr. Horton said that in his opinion one "Jack O'Neill" would be willing to execute a recordable contract. But Jack O'Neill did not own property in Imperial Valley. His property was located near the San Luis Project, 400 miles to the north. *Hearings on S. 1425, 2541, and 3448, Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs,* 85th Cong., 2d Sess. 88 (1958). The testimony of Mr. Horton relied on by Respondents had nothing to do with Imperial Valley or the willingness of landowners there to sell the excess lands.

Respondents also refer to testimony at the trial in 1971 to the effect that land in Imperial Valley could only be used for farming. Resp. Br. 172. Since then, however, considerable acreage within the District's boundaries has been leased for geothermal exploration and industrial uses.

We are aware of no statement in the record of this case, made on behalf of landowners in the Imperial Valley, to the effect that such landowners would sell their excess lands if denied project water for those lands.

In support of their contention that landowners in the District will surely sell their excess lands if denied project water therefor, Respondents make the remarkable statement that:

> "Experience in the reclamation program shows that excess landowners never hesitate to execute recordable contracts." Resp. Br. 89.

The patent invalidity of this contention is nowhere better illustrated than in California. Following the Ninth Circuit's decision in *United States* v. *Tulare Lake Canal Company,* 535 F.2d 1093, *cert. denied,* 429 U.S. 1121 (1977), holding that § 46 applies to private lands in the Central Valley receiving irrigation benefits from the King's River Project, King's River landowners refused to execute recordable contracts, and announced their intention to revert to pre-project operations.[14] Landowners receiving irrigation benefits from the Kern River Project have stated their intention to do the same thing if the government insists on the execution of recordable contracts there.[15]

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[14] *Indio Daily News* (April 5, 1978), reporting a statement made before the Subcommittee on Water and Power of the House Committee on Interior and Insular Affairs at a field hearing held in Fresno, California, concerning amendments to the 1902 Act. Acreage limitations apply only to "project water," *i.e.*, water which is released at times when it would not be available but for the federal project. Landowners electing not to sell their lands may continue to use pre-project water supplies. See *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S., at 285-286.

[15] *Reclamation Reform Act of 1979: Hearings before the Subcommittee on Energy Research and Development of the Senate Committee on Energy and Natural Resources,* 96th Cong., 1st Sess. 492 (1979).

D. The fact that acreage limitations have been applied to Coachella is irrelevant because Coachella has no present perfected rights.

The Solicitor General and Respondents Yellen, *et al.*, make repeated reference to the fact that Coachella Valley, which is served by the All-American Canal, is subject to acreage limitations. S.G. Br. 29 n. 13, 39 n. 20, 59; Resp. Br. 54, 85, 87, 136, 145. They argue that the Project Act does not distinguish between Coachella Valley and Imperial Valley, and therefore acreage limitations should apply to Imperial Valley as well. The problem with this argument is the fact that there are not, and never have been, present perfected rights in Coachella Valley. See Judge Turrentine's comment, Pet. App. 106a-107a. Thus, § 6 of the Project Act—as well as Article VIII of the Compact and this Court's 1964 and 1979 decrees in *Arizona* v. *California*—has no application to Coachella Valley. Section 14 of the Project Act can incorporate the acreage limitation provisions of the reclamation law with respect to Coachella, without conflicting with § 6. Thus, the fact that acreage limitations apply in Coachella is irrelevant to the question of whether they apply in Imperial.

V. The Wilbur Decision, the Harper and Barry Opinions, and Subsequent Administrative Practice.

Secretary Wilbur's Decision

This suit is basically a challenge to the letter-ruling of Secretary of the Interior Ray Lyman Wilbur in 1933 that the 160-acre limitation "does not apply to lands now cultivated and having a present water right" in Imperial Irrigation District irrigated from the All-American Canal, and that "these lands, having already a water right, are entitled to have such vested

right recognized without regard to the acreage limitation mentioned." A. 177a.

The Wilbur holding, although adhered to for the next 31 years by six Secretaries in four Presidential administrations (and subsequent to the initiation of this suit, by a seventh Secretary, Rogers C.B. Morton), is now sought to be reversed on the following grounds:

(1) It is said that "[i]t is an interpretation made after enactment of both statutes and consequently never before Congress when the Project Act was being considered." S.G. Br. 64-65 n. 35, quoting the Court of Appeals. Of course. It was an administrative construction made by the officer charged with the administration of the act, the man bearing the responsibility for putting the new statute into motion and making its parts run smoothly, *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315 (1933), and who was charged by § 4(b) of the Project Act with the responsibility for obtaining repayment contracts as a precondition to seeking appropriations for construction.

(2) It is charged that Wilbur's holding was an interpretation of § 5 of the 1902 Act, whereas the question Secretary Wilbur ought to have decided was the applicability of § 46 of the 1926 Act, although § 5 was the only excess land law cited in the allegation that he was answering. But this Court, in *Ivanhoe,* thrice termed § 46 of the 1926 Act a "reenactment" of § 5 of the 1902 Act, 357 U.S., at 278 n. 2, 289, 290, and devoted its own discussion almost entirely to § 5. If one statute was inapplicable to lands possessing a present perfected right within the meaning of § 6 of the Project Act, both statutes were. The Chief Counsel of the Bu-

reau of Reclamation (Mr. Dent) on March 1, 1933, so advised the Bureau attorney who was monitoring the *Hewes* case:

> "In my view the acre principle discussed in the Secretary's letter of February 24, based upon section 5 of the reclamation act, involves precisely that contained in section 46 of the act of May 25, 1926. The latter act merely ties up with and emphasizes what has always been the law in this respect." A. 179a.

(3) The Solicitor General, at S.G. Br. 62, apparently adopts Mr. Barry's statement that " '[t]he record is ambiguous as to whether the Department had actually determined the excess land laws not to be applicable to Imperial Irrigation District prior to the execution of the contract," challenging the veracity of the statements of Secretary Wilbur and of Chief Counsel Dent that this determination had been made "early in the negotiations." There is nothing ambiguous about it.

Former Solicitor Weinberg, who participated in drafting the Barry opinion, conceded in cross-examination in the present case:

> Q. "In 1932, it's a fact, is it not, that the acreage limitation clause was initially put in the drafts of the contract, and then physically deleted?"
>
> A. "Yes, that is a fact." Tr. 221.

Moreover, the decision was made even earlier than 1932. The record shows that the contract article which recites the applicability of the reclamation law went through numerous drafts. In the draft of *November 12, 1930* (Defendants' Exhibit AB), the applicability

of the land limitation law was treated in Article 29 as follows:

> "LIMITATION OF RECLAMATION LAW. ART. 29.
>
> "The delivery of water under the terms and conditions hereof, and the operation and maintenance of the works to be constructed hereunder, shall be subject to and controlled by the limitations of the Reclamation Law. . . ."

Article 29 of the draft of November 12, 1930, was changed by the draft of *April 29, 1931* (Defendants' Exhibit AC). In this draft, Article 31 provided:

> "LIMITATIONS OF RECLAMATION LAW. ART. 31.
>
> "Except as provided by the Boulder Canyon Project Act, the Reclamation Law shall govern the construction, operation, and maintenance of the works to be constructed hereunder."

Finally, in the draft of *September 24, 1931* (Defendants' Exhibit AD), Article 30 of the contract of December 1, 1932, appeared in its present form for the first time. Article 30 of that draft provided:

> "APPLICATION OF RECLAMATION LAW. ART. 30.
>
> "Except as provided by the Boulder Canyon Project Act, the Reclamation Law shall govern the construction, operation and maintenance of the works to be constructed hereunder."

In other words, the expression "delivery of water" in the draft of November 12, 1930, was deleted in the draft of April 29, 1931, and subsequent drafts; the application of the reclamation law in the draft of

April 29, 1931, and subsequent drafts was specifically limited by the phrase, "Except as provided by the Boulder Canyon Project Act"; and the caption "Limitations of Reclamation Law" was changed to "Application of Reclamation Law." The language in that form remained unchanged in the contract which Secretary Wilbur approved as to form in an opinion dated November 3, 1931 (signed also by the Solicitor, the Commissioner of Reclamation, the Reclamation Bureau's Chief Counsel (Assistant Commissioner), and the Secretary's two Executive Assistants, after a public hearing October 22, 1931).[16] The public hearing was held after notifying all parties who had expressed any interest in the All-American Canal contract. No one asked to be heard on the excess land question. All persons who asked to be heard were heard, by the Secretary in person.[17] The contract was executed December 1, 1932.[18]

It may be useful at this point to recount how the Wilbur ruling came to be made, since this also is called in question. On February 7, 1933, Mr. Porter Dent, Assistant Commissioner and Chief Counsel of the Bureau of Reclamation, who had been in charge of negotiating the All-American Canal contract, wrote Secre-

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[16] This sequence of changes was acknowledged at trial by government counsel. Tr. 555.

[17] U.S. DEPARTMENT OF THE INTERIOR, THE HOOVER DAM CONTRACTS, 563-569 (1933).

[18] The 13-month interval between approval as to form and execution was due to Coachella Valley County Water District's reconsideration of a proposed merger with Imperial Irrigation District. Coachella decided to negotiate a separate repayment contract. *The Hoover Dam Documents, House Document No. 717*, 80th Cong., 2d Sess. 121 (1948).

tary Wilbur's Executive Assistant, Mr. Northcutt Ely, reporting the issue that had arisen in the confirmation action (*Hewes*) with respect to the applicability of the land limitation. Ex. AM, A. 219a. He said that the District was concerned, and wanted a statement of the Department's views. He said, *inter alia*:

> "*Early in the negotiations* connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this proposed canal. *So far as I am advised, all who have given this matter consideration agree that this limitation does not apply to lands now cultivated and having a present water right. The view has been, and is, I believe, that these lands having already a water right, are entitled to have such right recognized without regard to the acreage limitation mentioned.* Congress evidently recognized that these lands had a vested water right when the provision was inserted that no charge shall be made for the storage, use or delivery of water to be furnished these areas.
>
> * * * * *
>
> "This matter is submitted for your consideration and such action as may be considered advisable. If the Department is in agreement with the foregoing I believe a letter to the district or a formal decision to that effect would be helpful (emphasis added)." A. 220a-221a.

The Secretary concurred, and directed, through Mr. Ely, that Mr. Dent prepare a letter to the District along the lines recommended by Mr. Dent. A. 223a. Mr. Dent did so, and the Secretary signed it February 24, 1933. Ex. AO, A. 224a. A comparison of Secretary Wilbur's letter with Mr. Dent's memorandum (A. 219a), dated February 7, shows that the operative language in the

two is substantially identical. In other words, the original recommendation and the final letter incorporating that recommendation both came up to the Secretary through routine channels from the Chief Counsel of the Reclamation Bureau, the lawyer in the Department best qualified to decide the question raised in the *Hewes* case. Secretary Wilbur approved Mr. Dent's recommendation, unchanged. Mr. Dent, Assistant Commissioner and Chief Counsel, was a 20-year career lawyer in the Interior Department and compiler of the Department's publication, FEDERAL RECLAMATION LAWS (1931). Mr. Dent's ability and integrity were above challenge.

(4) It is said that Secretary Wilbur signed his letter to the District only a few days before he left office, as though this were relevant. Solicitor General Griswold answered this innuendo in his memorandum of April 8, 1971, as follows:

> "It is said that the action by Secretary Wilbur in February, 1933, was taken in the dying days of the Hoover administration, and therefore, for some reason, is not entitled to great weight. These were, however, the officers who had been responsible for the construction of the Hoover Dam, and who had carried out all of the negotiations under the Boulder Canyon Project Act, and particularly those with respect to the All American Canal. They were the ones who were then charged with the administration of these statutes. It is hard for me to think of officers who would have been better qualified to know what the appropriate resolution of this problem was. Moreover, they could well have felt that it was not fitting to let such a matter go over to the new administration, since they were directly responsible for it, and had the experience to deal with it.

"On this matter, it seems to me significant, too, that no steps were taken by the immediately succeeding administration to upset the determinations made in February, 1933. If there had been serious doubts about this, it seems clear that they would have been raised in the Franklin D. Roosevelt administration. If prompt doubts had been raised, we would not have a long continued administrative construction, and the situation today would be very different. But the initial questions were raised about this only in the mid 1940's, and only with reference to another valley served by the project. Application to the Imperial Valley was soon denied, and no action was taken which directly opposed the conclusion of Secretary Wilbur in the Imperial Valley until the opinion of the Solicitor of Interior on December 31, 1964.

"This was more than 31 years after Secretary Wilbur's determination. Whether there was any political motivation in this, I do not regard it as relevant. The significant thing, it seems to me, is that the prior determination had then been outstanding for 31 years, had been widely understood and accepted, and had been extensively relied upon."

(5) And, finally, it is said that Secretary Wilbur was wrong as a matter of law. The short answer is that he construed the Project Act in the same way that this Court did in *Arizona* v. *California,* 376 U.S. 340 (1964), as requiring the satisfaction of vested rights, and that his opinion was in accord with the controlling precedents and the specific regulations of the Department, which have been in effect from 1910 down to this day.[19] Secretary Wilbur was right on the

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[19] 43 C.F.R. § 230.70. See, to the same effect, 3 C. KINNEY, LAW OF IRRIGATION AND WATER RIGHTS 2309 (2d ed. 1912), and discussion Dist. Br. 66-67.

merits, quite aside from the deference shown to his decision by seven subsequent Secretaries and Solicitor General Griswold.

The Solicitor General disputes our assertion that the Wilbur ruling with respect to Imperial Valley was adhered to, as Judge Turrentine put it, by six succeeding Secretaries in four Presidential administrations.[20] A. 108a-109a. He says that it was "soundly discredited" (S.G. Br. 64) in an opinion by Solicitor Harper of the Interior Department in 1944 (A. 230a), as well as by an opinion by Solicitor Barry in 1964 (A. 182a). This is very thin gruel, as we shall see. Moreover, the Department reverted to Secretary Wilbur's reasoning in 1963, in dealing with vested rights on the Sacramento River, a year before the Barry opinion (*infra* at 37).

Solicitor Harper's 1944 Opinion

Mr. Harper's opinion (A. 230a) held the excess land provisions of the reclamation law applicable to lands in Coachella Valley, which had no present perfected rights, but he was careful to leave Secretary Wilbur's decision untouched as to Imperial. It is true that he criticized Secretary Wilbur's decision, but, as Judge Turrentine pointed out, Mr. Harper seemed inexplicably ignorant of the existence of present perfected rights in Imperial Valley. Mr. Harper said "nothing in the files indicated whether such is the factual situation . . . ." Judge Turrentine's castigation of Mr. Harper's carelessness deserves rereading:

> "There was of course ample data then available to show that in Imperial Valley there were in ex-

[20] The numbers, it is now known, can be increased to seven Secretaries in five Presidential administrations, to include Secretary Morton in the Nixon Administration. See *infra* at 257a.

> cess of 400,000 acres receiving pre-project irrigation in reliance on rights to Colorado River water. The major weakness of the Harper decision as it relates to Imperial Valley is its failure to deal with this question of pre-project water rights. There was much discussion of how section 14 of the Project Act made that act a supplement to reclamation law, but no discussion of congressional recognition of pre-existing rights under the Colorado River Compact found in sections 6, 8, and 13 of the Project Act." Pet. App. 106a.

The United States carries this same error into its brief. S.G. Br. 18, 28-29, 39.

Solicitor Barry's 1964 Opinion

It is significant that Solicitor Barry's opinion (A. 182a), although it was dated December 31, 1964, more than 18 months after this Court's opinion in *Arizona* v. *California* (June 3, 1963), and more than nine months after the initial decree in that case (March 9, 1964), does not once mention either the opinion or the decree. The subject of present perfected rights, referred to some ten times in the Court's opinion, and made the subject of specific definition in the decree, was mentioned by Mr. Barry only once, and then in conclusory terms: "Section 6 cannot be read as insulating the District lands from acreage limitation."

Barry's omissions of all reference to the treatment of present perfected rights in this Court's opinion and decree are all the more remarkable because the Barry opinion had been secretly under preparation for some eight months (commencing after the decree had been handed down), without notice to the District or opportunity for it to be heard. Tr. 210-212.

The Barry opinion was put in its true light as a "partisan brief" by the comments upon it submitted by Under Secretary John A. Carver, Jr.,[21] to Secretary Stewart Udall (Defendants' Exhibit CQ):

> "The opinion is long on protestations of certitude, but the supporting documentation constitutes a usefully thin skein of separate statutes laid end to end with only the doctrine of *pari materia* to provide the linkage. To put it another way, the opinion might well suffice as a partisan brief to defend or justify total disruption of a multi-million dollar industry in support of some compelling policy objective. But it is less than persuasive in laying the groundwork for a conclusion that such action is required by law.
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> "This fault lies primarily in the fact that the opinion fails or neglects to consider the possibility of any other conclusion and, having done so, does not dispose of counter arguments which have at least a surface appearance of validity. Among these I would enumerate the following:
>
> "a. Key reliance is placed on Section 46 of the 1926 Omnibus Adjustment Act, or at least one sentence therein. But the section itself refers to 'proposed construction of the irrigation works' in apparent contemplation of a wholly new development of irrigated land. Moreover, the immediately preceding sentence of the same section is concerned with Federal-State cooperation 'in prompting the settlement of the projects or divisions after completion and in the securing and selecting of settlers.' The implication seems clear that Congress was looking to *Federally sponsored future* developments. Yet in 1926 when this act was passed, in 1928 when the

[21] Mr. Carver was subsequently a member of the Federal Power Commission, and Professor of Law at the University of Denver.

Boulder Project was approved and in later years when water first became available through the All-American Canal, the Imperial district was a going concern with a fully developed distribution system and an established pattern of land ownership. Query: Under this fact situation and the prospective language used in the act, did Congress intend to force acreage restrictions where the only effect was to change the method of delivering water to an existing district already developed through private initiative?

"b. The doubt expressed above is further reinforced by the policy which Congress expressed in Section 48 of the same act. That section, as codified at 43 USC 423f, states the purpose of the legislation to be 'the rehabilitation of the several reclamation projects and the insuring of their future success by placing them upon a sound operative and business basis' and directs the Secretary of the Interior 'to administer [the act] to those ends.' The act was, in fact, a general relief measure aimed at canceling out deficits which were strangling some 20 Federal irrigation projects. Imperial was not one of those areas treated in the act. Congress quite obviously did not have it or its situation in mind in enacting Section 46. Query: In what manner would the belated application of Section 46 to the Imperial District serve the purposes and objectives which Congress specified in enacting the 1926 act?

"c. Similarly, Congress left no doubt as to its over-all objectives in enacting the Boulder Project Act. Section 6 enumerates the purposes to be served by construction of the dam and reservoir, including 'satisfaction of present perfected rights in pursuance of Article VIII of [the] Colorado River compact.' Article VIII specifies that 'Present perfected rights to the beneficial

> use of waters of the Colorado River System are unimpaired by this compact.' The legislative history of the Boulder Project Act makes it clear that the Congressional committees regarded the Imperial District lands as having present perfected rights to these waters. I am strongly of the view that any Congressional intent to alter or change the ownership of such rights must be found in specific terms, rather than implied from general language of dubious applicability.
>
> "In summary, the opinion before you invokes the *in pari materia* doctrine to splice together enough cloth to reach its conclusion. In so doing, however, it violates an even more basic rule of construction, namely that *all* of the sections of a statute must be weighed and given weight."

Secretary Udall nevertheless continued on his way.

Whatever the merits, or lack thereof, in the Harper and Barry opinions, it is clear that they were in turn overruled insofar as the effect of the 1933 Wilbur determination is concerned by the 1971 opinion of Solicitor Melich (reproduced *infra* at 258a), who agreed with Deputy Attorney General Kleindeinst and Solicitor General Griswold that the Wilbur decision should be left undisturbed, and that no appeal should be taken from Judge Turrentine's decision to that same effect.

Administrative Exemptions

Our opponents rely heavily on the following statement in *Ivanhoe*:

> "Significantly, where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such exemption by express enactment." 357 U.S., at 292.

The Court was relying upon assurances in the government's amicus brief that were not strictly accurate even when made in 1958 (*viz.* the Department's 1910 regulations, still in force, exempting "larger areas" owning vested rights from land limitations; 38 L.D. 637 (1910), 43 C.F.R. § 230.70), and that became grossly inaccurate in 1963, when the Sacramento River "diverter contracts," relating to diversions from the Sacramento River of water stored by Shasta Dam, pursuant to the Central Valley Project Act, 50 Stat. 844, were entered into by the same Secretary who caused the present suit to be filed. The Solicitor General's repetition of this representation in 1980 is explainable only on the assumption that the Secretary has not told the Department of Justice about the Sacramento diverter contracts.

The Final Report of the National Water Commission to the President, WATER POLICIES FOR THE FUTURE (1973), stated:

> "4. Some landowners and districts obtained exemption when water under U.S. Bureau of Reclamation (Bureau) control is [*sic*] declared to be natural flow, in which the landowners or districts had rights antedating the construction of the project. The most notable example of this exemption is found in the Sacramento River Diverter contracts executed in connection with the Shasta Dam project in Northern California." *Id.*, at 143.

Examination of the Commission's underlying study, H. HOGAN, ACREAGE LIMITATION IN THE FEDERAL RECLAMATION PROGRAM (1972) ("the Hogan Study"), cited in support of these statements, shows that the quantities involved in the Sacramento diverter contracts were very substantial. The Hogan study reported:

> "The San Luis Act of 1960 (74 Stat. 156) contemplated the delivery of Sacramento River south

to the San Joaquin Valley. The ability of the Bureau of Reclamation to make the delivery required that a ceiling be placed on the right of riparian users along the Sacramento River to divert the water from the river. North of Sacramento in 1963 such users diverted annually about 2,500,000 acre feet from the river to service about 900,000 acres. After years of negotiation diverter contracts were signed on December 27, 1963 between the Secretary of the Interior and the riparian users. The diverter contracts designated about 70 percent of the diverted water to be private 'base rights' to which the acreage limitation did not apply.

* * * * *

"The 'base' supply recognized by the diverter contracts was vastly inflated. It bore no relation to any legal theory." *Id.*, at 132, 134.

The study quotes a report of the Comptroller General to Congress dated October 18, 1968, stating:

" 'These contracts will, in GAO's opinion, permit the water users to use annually, without charge, 950,000 more acre feet of water, having a contract value of $2 an acre foot, than was available for use in an average year prior to the operation of Shasta Dam and Reservoir.' " *Id.*, at 135.

The Hogan study continues:

"The maximization of the 'base' figure minimized the 'project' water and with it the quantity of land that had to submit to the acreage limitation. . . .

"The diverter contracts recognized the existence of the acreage limitation and effectively nullified it in practice. . . . Of 198,341 excess acres, 198,009 are able to dispense with water designated by the diverter contracts as project water." *Id.*, at 135-136.

Not only were these Sacramento River "diverter contracts" executed in the administration of the same Secretary who recommended the filing of this lawsuit against Imperial, but, *mirabile dictu,* the Department's Solicitor at the time was Mr. Frank J. Barry.

VI. The Solicitor General Misconstrues the Issue of "Finality".

Whether the Wilbur decision in 1933 was right or wrong (and it was plainly right), it was not open to reversal by a subsequent Secretary some 34 years later. Principles of administrative and judicial finality preclude such gyrations. The present Solicitor General's arguments, based on the premise that the United States was not a party to the *Hewes* case in 1933, miss the point.

A. The 1933 in rem judgment in the *Hewes* case is dispositive of the present suit for three related but independent reasons:

(1) The *Hewes* in rem judgment, in proceedings required by 43 U.S.C. § 511, is res judicata as against Yellen, *et al.* That being so, Respondents lacked competence to litigate all over again the applicability of the acreage limitation laws in Imperial Valley in the guise of an appeal taken from a judgment against the United States in a district court case in which they were not parties. We put to one side the additional question of whether a stranger can intervene to reverse the decision of the Solicitor General not to appeal a judgment against the United States with which the Solicitor General was satisfied, and thereby cause the United States to be bound by a different result in an appellate court, reached on arguments not presented by the United States. The Solicitor General, not some volun-

teer, has authority to make the decision whether or not to appeal. See 28 C.F.R. § 0.20(b), and Solicitor General Griswold's memorandum, *infra* at 249a. *Cf. Thompson* v. *United States,* —— U.S. ——, 62 L.Ed.2d 457 (1980).

(2) If Yellen, *et al.,* lacked competence to appeal, the case was not properly in the Court of Appeals, and it is not properly in the Supreme Court. The District Court judgment would plainly be res judicata against the United States, if it were not for Dr. Yellen's appeal. The Solicitor General is properly here only in the capacity of amicus curiae, arguing Respondents' case. The question is not, as the Solicitor General implies (S.G. Br. 68 n. 38), whether the United States is bound by the *Hewes* judgment. It is not necessary to reach that point, as it might have been if the government had appealed from the District Court judgment.[22]

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[22] If the United States were a party on appeal, it might very well find its suit precluded by this Court's recent decision in *Montana* v. *United States,* 440 U.S. 147 (1979), which held the United States to be subject to collateral estoppel by a state court judgment rendered in circumstances strikingly similar to those which resulted in the *Hewes* decision. There, as here, (1) the United States required its contractor to file a test suit in a state court (in the case of *Hewes,* this requirement was statutory and was made explicit in the government's contract with the District (Art. 31, Pet. App. 31)); (2) the United States was not a party; (3) the government submitted a brief in the state court (in *Hewes,* a letter ruling of the Secretary); and (4) the government effectuated the abandonment of an appeal which challenged the trial court's judgment. In the case of *Hewes,* unlike that in *Montana,* the judgment was in favor of the side supported by the Secretary, and the Secretary (Ickes) got rid of the appeal by refusing to allocate funds for construction until the appeal was abandoned. When it was abandoned, the Secretary represented to Congress that the contract thus confirmed complied with the requirements

The question as to *Hewes* is not necessarily whether the government is bound by that judgment, but whether the government's voluntary protector and champion, Dr. Yellen, is bound. He plainly is. Lacking competence to relitigate *Hewes* on his own behalf, he certainly lacked competence to do so on behalf of the United States in the teeth of Solicitor General Griswold's decision to abide by Judge Turrentine's judgment.[23]

(3) As against the United States, the proceedings under 43 U.S.C. § 511, resulting in the *Hewes* judgment, have acquired finality, whether or not the judgment was technically res judicata [24] against the United

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of § 4(b) of the Project Act, and Congress, agreeing, appropriated construction money.

The *Hewes* confirmation proceedings accomplished their statutory purpose, and the United States, if it comes to an issue of collateral estoppel, is precluded from now asserting a construction of the Project Act and contract opposite to that which it presented to the state court, and which that court confirmed.

[23] It is proper to note here that Dr. Yellen was disqualified to prosecute this appeal for an independent reason. Even if the *Hewes* judgment had never been entered, Yellen, *et al.*, lacked standing in the present suit, or, if they once had it, they lost it while this case was on appeal, for the reasons stated in Dist. Br. 75-83.

[24] The Solicitor General says, erroneously, that the defense of res judicata was not asserted against the United States as plaintiff in the District Court. S.G. Br. 68 n. 38. This statement is mistaken, although it is practically a quotation from the Ninth Circuit's opinion. Pet. App. 24a. Both the District and the intervening landowners raised the defense of res judicata in their answers to the complaint in the District Court. The District in paragraph VII of its answer referred to *Hewes* and alleged: "... that said contract, 'Exhibit A' as written, and as well said confirmatory judgment are, and each of them is, binding upon the United

States, and not necessarily because of equitable estoppel arising from that judgment (but see *Montana* v. *United States,* 440 U.S. 147 (1979)). It is not a mere matter of "comity" (the Solicitor General's expression); finality is compelled because the result reached by the state court was accepted by the United States as the basis for a contract with the District, performed on both sides for 34 years. Finality of the bargain was achieved, over the years, when Congress, informed of the *Hewes* decision, repeatedly appropriated money to build the canal; when works were built for the government in reliance on *Hewes*; and when the District, in reliance on *Hewes,* undertook a new debt of $25,000,000, abandoned its Mexican canal, and became dependent on the new works. These actions, cumulatively, amounted to a good deal more than the "expectancies" which ripened into finality in *Kaiser Aetna Co.* v. *United States,* —— U.S. ——, 62 L.Ed.2d 332, 346 (1980). As this Court said in *Ivanhoe,* "Such a record [of congressional awareness] constitutes ratification of administrative construction, and confirmation and approval of the contracts." 357 U.S., at 293-294. This is especially true in this case, because the government's contract with the District was submitted by Secretary Ickes to Congress as evidence of compliance with the requirement of § 4(b) that the Secretary have in hand

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States." A. 308a. Also, in paragraph XII of its answer, the District repeated: ". . . that said judgment is conclusive on the Plaintiff herein." A. 309a. The intervening landowners in section VI of their answer entitled "Contention Re Res Judicata" recited the facts concerning the validation proceeding in *Hewes* and concluded: "As a result, the judgment in the *Hewes* case is binding on the United States and upon each and all of said persons and parties, all as contemplated by 43 U.S.C. § 511 above mentioned." A. 296a.

a repayment contract before requesting appropriations for construction. Congress made the appropriations. Mr. Ickes was in office during the entire time that the canal was under construction.

B. The Solicitor General's arguments about *Hewes*

The Solicitor General offers three arguments as to why Dr. Yellen, *et al.*, are not bound by the in rem judgment in the *Hewes* case: (i) the resolution of the question of whether acreage limitations applied to lands in Imperial Irrigation District having present perfected rights was not necessary to a decision as to whether or not the contract between the United States and the District was valid under federal and state law, S.G. Br. 70-72; (ii) a state court cannot decide questions of federal law, S.G. Br. 71; and (iii) subsequent events justify liquidation of the res judicata effect of that judgment, S.G. Br. 72-76. All three positions are unsound.

1. The applicability of land limitations had to be decided in *Hewes*

If the *Hewes* court had held (as the Ninth Circuit did) that the Project Act required inclusion of a land limitation in the contract, the *Hewes* court would have had to hold the contract invalid, not only because the contract did not contain such a clause, but because both parties to that contract were in agreement that (i) the exclusion was deliberate and that (ii) no such limitation was required because of the existence of vested rights to water from the Colorado River.

If the *Hewes* court had held an acreage limitation to be applicable, the only recourse would have been to amend the contract to include such a limitation and to

submit that contract to the voters for approval. If it is assumed that the voters would have approved such a contract, two key questions would have been generated, to be litigated in a new confirmation proceeding under 43 U.S.C. § 511: (i) the constitutionality, under federal and state law, of a contract which prohibited delivery of water to lands to which present perfected rights were appurtenant unless their owners would sell those lands as desert, without compensation for the water rights taken, and (ii) whether the District, as trustee for those lands, had competence to enter into a contract which deprived them of the value of their water rights.[25] The conclusion of the Ninth Circuit would force on the District, retroactively, a contract that its voters had never approved and that had never been judicially confirmed in an in rem proceeding as required by federal and state statutes. This is highlighted by the fact that in 1952, a different Secretary, in negotiating a new contract with the District, deliberately refrained from trying to include a land limitation because he knew that such a contract would not be accepted by the District's voters. See Judge Turrentine's comment, Pet. App. 107a n. 29.

2. Congress may authorize a state court to decide questions of federal law, and the purpose of 43 U.S.C. § 511 could not have been accomplished without such a determination in this case

The *Hewes* decision was not res judicata, the Solicitor General says, because "the court improperly de-

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[25] It bears repetition that this is the exact result contended for by the Solicitor General (S.G. Br. 22) and the Yellen group (Resp. Br. 169, 171). Dr. Yellen adds that only by selling their land at its ex-water right value can the owners of "some of the finest farmland in the world" (Resp. Br. 170) obtain payment for their improvements (Resp. Br. 172-173).

parted from the issue before it in *Hewes* and impermissibly addressed more general questions of the applicability of the excess-acreage limitation, not under the contract, but rather directly under the statutes." S.G. Br. 71.

43 U.S.C. § 511, delegating jurisdiction to state courts to determine the validity of a contract between the United States and an irrigation district, cannot be given this restricted reading. The *Hewes* court had to examine the question of whether or not federal law laid upon the District the duty of withholding water from lands in excess of 160 acres, before it could pass upon the question of whether the District had competence under state law to accept and enforce such an obligation.

It is clear that the state court could be given jurisdiction to determine limited questions of law, federal or state, subject to review by this Court. *United States* v. *District Court for Eagle County,* 401 U.S. 520 (1971); *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800 (1976). These cases made explicit what should have been clear as a matter of first principle from the necessities of the federal system: state courts are and must be entrusted with jurisdiction to decide questions of federal law; federal courts to decide questions of state law. Federal question issues may indeed be forced upon reluctant state courts for decision. *Testa* v. *Katt,* 330 U.S. 386 (1947).

3. "Later events" have not dissolved *Hewes*

The Solicitor General's next line of argument is even thinner. *State Farm Insurance Co.* v. *Duel,* 324 U.S.

154, 162 (1945), and *Commissioner* v. *Sunnen,* 333 U.S. 591, 599-600 (1948), are relied on to bring this case within the exception to res judicata or collateral estoppel where there has been an "intervening decision or a change in the law." S.G. Br. 73-74. Both are taxation cases. *Duel* is a case where the government sought unsuccessfully to rely on res judicata, despite a change of state judicial decision in the controlling law of spendthrift trusts. *Sunnen* is a case where collateral estoppel was not allowed to provide a taxpayer with a perpetual tax exemption. Annual tax liability, of course, is never the subject of a rule of property.

Here, on the other hand, the subject matter is not taxes, but water rights. The water rights, as the government points out, are all-important. They make the difference between land worth at most $50 an acre without water and land worth $1400 with water. S.G. Br. 22. These rights, appurtenant to the land, are real property, worth far more than the land itself. Permanence of the supply is essential, as § 5 of the Project Act recognizes. The necessity that a right to water be specific, firm, and permanent was the reason for the years of litigation in *Arizona* v. *California.*

Moreover, the four "changed circumstances" relied on by the Solicitor General confirm, rather than detract from, the result in *Hewes*:

(1) "*The Interior Department's continued consideration of the question, culminating in Solicitor Barry's formal opinion in 1964.*" S.G. Br. 73. Quite aside from the obvious flaws in Mr. Barry's opinion (*e.g.,* its failure to consider or even mention the opinion and 1964 decree of this Court in *Arizona* v. *California* as

to the effect of present perfected rights),[26] it was scarcely evidence of "*continued* consideration" of the land limitation question. The Barry opinion came along 31 years after the 1933 Wilbur decision; 30 years after the dismissal of the appeal from the *Hewes* judgment (on Secretary Ickes' insistence) in 1934; 22 years after completion of the All-American Canal and the District's consequent abandonment of its Mexican canal in 1942; 17 years after Secretary Ickes' decision (notwithstanding the Harper opinion) not to reopen the Imperial question when he executed the 1947 Coachella distribution canals contract (Pet. App. 105a); 16 years after Secretary Krug refused in 1948 to reconsider the Wilbur decision (Pet. App. 105a); and 12 years after Secretary Chapman decided not to attempt to put a land limitation clause into a new Imperial contract that he signed in 1952 (Pet. App. 107a). All of the "continued consideration" before Barry came along resulted in leaving the Wilbur decision undisturbed. The 1964 Barry opinion, as we now know from the sworn testimony of his successor, Solicitor Weinberg, in this case, was prepared in secret over an eight-month period, commencing after the opinion and decree in *Arizona* v. *California,* and without giving the District notice or opportunity to be heard. Tr. 210-212. This was not exactly a viable escape route, 31 years after the event, from a state court judgment and a decision of the Secretary, even assuming that somehow "continued consideration" is a talisman that would enable this to be done.

Beyond this, we have never before heard it asserted that a Solicitor's opinion could amount to "an intervening change in the law," and indeed can change the

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[26] See *supra* at 34 for Under Secretary Carver's contemporaneous criticism of the Barry opinion.

law retroactively. Mr. Barry disagreed on acreage limitation questions with three of his predecessors, Messrs. Finney, Cohen and Bennett, and Barry himself was in effect overruled in 1971 by Solicitor Melich when the latter recommended that Judge Turrentine's decision not be appealed. Did the law change with each opinion, and, if so, back to what date?

(2) *Ivanhoe.* The second of the ex post facto "developments" invoked by the Solicitor General to erase res judicata from *Hewes* is this Court's 1958 decision in *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275 (1958). S.G. Br. 73. But his characterization of this case as one "which explicated, in the context of a confirmation proceeding, the excess-acreage limitation and its effects on *water rights vested under state law*" is dead wrong. In *Ivanhoe* there was no Project Act requiring delivery of water to satisfy present perfected rights, and not a cupful of such rights to satisfy.

Ivanhoe is cited by the Solicitor General 8 times and by Respondents 16 times. It is the foundation of their case, but it is not on point. *Ivanhoe had nothing to do with vested water rights.* The Act of August 26, 1937, 50 Stat. 844, authorizing the Central Valley Project, pointedly omitted any requirement that the Secretary satisfy present perfected rights, although § 2 of the act tracked § 6 of the Project act in other respects.[27] *Ivanhoe* dealt solely with the question of whether or not the United States might require compliance with § 5 of the 1902 Reclamation Act in con-

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[27] Nevertheless, as shown *supra* at 36, Secretary Udall exempted from acreage limitations some 198,000 acres riparian to the Sacramento River, which used water stored by Shasta Dam, in recognition of their preexisting "base rights."

tracts for the sale of water from a federal project to districts which had no rights at all in the streams from which the United States was offering to supply water.[28] The holding was in the affirmative: the United States either held title or could acquire title to the water that it proposed to sell, and could condition the sale of this federal property. 357 U.S., at 291, 295.

Two irrigation districts, Ivanhoe and Madera, were involved. As to the Ivanhoe Irrigation District, the Supreme Court said:

> "It is interesting to note that irrigators in this district receive water diverted from the San Joaquin in which they never had nor were able to obtain any water right." 357 U.S., at 285.

Madera claimed only: " '[A]n incomplete, incipient and conditional right in the water applied for,' " in a state law appropriation—a right which the district nevertheless claimed "is vested and runs with the land." 357 U.S., at 287. The Supreme Court rejected that claim. This sort of a right, if it can be called that, is a far cry indeed from a present perfected right, defined in *Arizona* v. *California* as a right perfected by "the actual diversion of a specific quantity of water

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[28] The Court, throughout its opinion, dealt with § 5 of the 1902 Act (as Secretary Wilbur did in our case), not § 46 of the 1926 Act, which it called a "reenactment" of § 5. 357 U.S., at 278 n. 2, 289, 290. Solicitor Krulitz' opinion M-36919, December 6, 1979, said at p. 27:

> "In *Ivanhoe*, the Supreme Court essentially adopted the view that section 5 is the fundamental law in the reclamation program and the 1926 Act is merely a procedural modification in how the program is to be carried out."

that has been applied to a defined area of land." 376 U.S., at 341, para. I(G).[29]

The Court in *Ivanhoe* construed § 8 of the Reclamation Act of 1902 only with respect to its first clause, the direction that the Secretary conform to state law in the "control, use, or distribution of water used in irrigation," and held that § 5 of the act, rather than state law, controlled the Secretary's distribution of water owned by the United States. The Court did *not* restrict the vested rights clause in § 8 of the Reclamation Act, *i.e.*, that nothing in that act should be construed as affecting or interfering with any vested right acquired under the laws of a state. To the contrary, it referred to that section as requiring conformity with state law "when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein." 357 U.S., at 291. It did *not* construe or restrict the provision that the right to the use of water acquired under that act "shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 32 Stat. 390. Indeed, the minority opinion in *California* v. *United States,* 438 U.S. 645 (1978), defended *Ivanhoe* on the ground that the *Ivanhoe* court had held that "§ 8 dealt only with the acquisition of water rights and *required the United States to respect the water rights that were vested under state law* (emphasis added)." 438 U.S., at 691, referring to 357 U.S., at 291. This interpretation of *Ivanhoe* was made in a dissenting opinion which de-

[29] Furthermore, as this Court said in *Ivanhoe,* the government's contract provided that "[t]his limitation applies only to 'project water' *and previously existing water supplies are unaffected thereby* (emphasis added)." 357 U.S., at 285.

fended that decision against the majority's observation that the *Ivanhoe* court "goes further than was necessary" (438 U.S., at 673) and had used "unnecessarily broad language" in restricting the operation of state law (438 U.S., at 676). It should dispel any notion that *Ivanhoe* is authority for a contention that § 5 of the Reclamation Act (construed in *Ivanhoe*) or § 46 of the 1926 Act (called a "reenactment" of § 5 by the *Ivanhoe* court), authorizes the Secretary to dishonor rather than "respect the water rights that were vested under state law," and, a fortiori, water rights that this Court has held to have been perfected under both state and federal law.

(3) *This Court's decision and decrees in Arizona* v. *California.* S.G. Br. 73. We are not told how an opinion which held that the Secretary was obligated to deliver water in satisfaction of present perfected rights can now be said to somehow dissolve the state court judgment of 47 years ago, which came to the same conclusion. Dr. Wilbur and the *Hewes* court called these rights "vested" rights, but they, and this Court in *Arizona* v. *California,* were talking about the same thing—rights perfected under state law by the actual application of water to the very lands involved here.

(4) *This Court's opinion in California* v. *United States, 438 U.S. 645 (1978).* This is the fourth reason given for avoiding res judicata. The Solicitor General says that the District relies on this case "to support their view of both the paramount importance of vested rights in this area and the principle of deference under the reclamation law to state policies and procedures." S.G. Br. 73. We do, indeed. But he never makes clear why a decision that emphasizes the "paramount importance of vested rights" under state law constitutes a

reason for unseating the *Hewes* decision, which sustained a contract requiring the Secretary to serve such rights.

In all four respects, the Solicitor General's brief falls far short in its attempted rescue of Dr. Yellen, *et al.*, from the jaws of res judicata, and of the Secretary from the finality resulting from a course of action consistently followed by all Secretaries for more than three decades.

Whatever may be the esoteric escapes from judgments that may be imagined in other cases, a judgment which is required by 43 U.S.C. § 511, and implemented by the government's irrevocable construction of works and the community's irrevocable investments in reliance on the government's promise of "permanent service," is not of that evanescent kind. Otherwise 43 U.S.C. § 511, requiring a validation judgment as a prerequisite to the effectiveness of a contract between the United States and an irrigation district, would be a mockery. If one side could escape its effect by a plea of changed circumstances, so could the other, and the investment of the United States, predicated on the validity of the District's obligations to repay it, would have been built on sand. Conversely, the District's economy, predicated on the government's promise to deliver, permanently, agreed quantities of water through those works, would be forever insecure—a situation perilously close to the present one if the Circuit Court is affirmed.

If the Government prevails in this contention, it will have destroyed all purpose of the validation proceeding, except to make validation a trap for the unwary. The purpose of 43 U.S.C. § 511 is to put these matters at rest. Validation is the strongest judicial medicine known to the law to achieve finality.

Solicitor General Griswold put it cogently:

> "One of the arguments frequently made by the government is that of the importance of administrative determinations, particularly those contemporaneously made by the officers charged with the administration of the statute involved. This is familiar doctrine in the tax field, and it has long been applied in many other areas of the government. Moreover, there is a further doctrine. Good government requires a substantial measure of stability. There needs to be a basis for reliance on positions taken by responsible administrative officers. Here the position had been outstanding for 34 years before the present suit was filed. Although I make no suggestion that the statute of limitations applies in this case, the usual period of the statute of limitations with respect to real property is 20 years. There is reason behind such provision."

Respectfully submitted,

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March 18, 1980

APPENDIX

APPENDIX A

Memorandum of Solicitor General Erwin N. Griswold, April 8, 1971 (Congressional Record, February 20, 1980, p. S1632-33, daily edition).

OFFICE OF THE SOLICITOR GENERAL,

Washington, D.C., April 8, 1971.

MEMORANDUM FOR THE FILES

Re United States v. *Imperial Irrigation District,* et al., No. 67-7-T, S.D. California.

I have concluded not to authorize an appeal in this case.

Since this conclusion is contrary to the recommendation of Assistant Attorney General Kashiwa of the Lands Division, and is contrary to the recommendations of three members of my own staff, it is incumbent on me to write this memorandum expressing the reasons for my conclusion. The Solicitor of the Department of the Interior has recommended against appeal, although he gives no reasons for his conclusion.

It is also appropriate to note that various types of pressures have been circulating about including items received in the mail, columns by Jack Anderson, and others. With great care, and to the best of my ability, I have tried to be indifferent to these pressures, and to decide the question (which it is my duty to decide) strictly on the merits. I have tried to approach the problem as a lawyer, and as a Solicitor General, responsible on this matter at this point for the sound administration of justice and of governmental action.

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* The appendix to the District's Petition for Certiorari contained 248 pages, ending with page "248a"; the pagination of this appendix to the District's Reply Brief therefore begins with page 249a.

1. Irrigation in the Imperial Valley was originally a private enterprise. On this basis, the Valley grew and developed. By the early 1920's, the irrigated area had reached virtually its full extent.

2. The Boulder Canyon Project Act did not make possible the reclamation of any appreciable amount of land in the Imperial Valley. The land had already been reclaimed. The Boulder Canyon Project Act, by providing for the All American Canal, did provide for a more stable water supply for the Valley, by eliminating the risks of taking the water through Mexico; and it provided protection against the considerable risk of flooding with which the Valley had long been threatened. There is no doubt that this was a benefit to the Valley. Except in a very broad sense, though, it did not amount to reclamation. It helped to protect reclamation which had already occurred under private enterprise, but it did not make possible the cultivation of any appreciable number of additional acres.

3. Of great importance is the fact that there were already large land holdings in the Imperial Valley at the time the Boulder Canyon Project Act was adopted. By the late 1920's, the Valley had for many years been probably the most intensively farmed area in the United States. It was, indeed, the source of a large amount of fresh produce marketed all over the country. Much of this was produced on large land holdings. The Imperial Valley had never been a "homesteading" area. It had long been an area where large scale farming was conducted although there were some smaller farms, too.

4. It may well be that Congress could have provided that the improvement resulting from the construction of the All American Canal should be made only on condition that all large holdings be broken up, and that land holdings thereafter be limited to 160 acres. There is certainly nothing in the statute which says this expressly. As I have already indicated, the situated was not akin [sic] to the usual recla-

mation project, which brings new land into cultivation, and can appropriately provide that its benefits should be widely shared among small land holders. Here the Imperial Valley was already well established, and functioning on a very large scale, with many large holdings. It is, it seems to me, a rather different thing to say that large holdings must be broken up than it is to say that large holdings shall not be formed in a new development.

5. I recognize fully that arguments can be made on the basis of the statutory provisions, particularly those referring to "the reclamation laws," that the proper construction of what Congress did is that land holdings in the Imperial Valley should be reduced to 160 acres, in effect, retroactively. Arguments can be made the other way, too. On either basis, the arguments are extremely technical and complex. Neither conclusion can be said, in my judgment, to be clear or "required" as a matter of ordinary principles of statutory construction.

6. Similarly, the legislative history is far from clear, but can be read to provide support for either view. There are clear statements in the legislative history that the 160 acre limit was not involved. These are included in the opinion of the district court. Similarly, there are explicit statements in the legislative history (referred to in Mr. Kashiwa's memorandum) to the contrary. Actually, though, the entire legislative history is extremely complex. It is very hard to have any conviction that any of these items of legislative history have any close relation to the statute as it was finally enacted. The one thing that can be said about the statute passed by Congress is that it contains no express provision on this question and that the arguments that can be made about it, by reference to other statutes, and so on, are complex, and not very convincing.

7. In this situation, we have what seems to me to be the determinative factor in this case. This is the announcement made by the Secretary of the Interior, Ray Lyman Wilbur

in February, 1933. This was to the clear effect that the 160 acre limitation was not applicable in the Imperial Valley, for the reason that no new water was being sold under the All American Canal project.

This was a clear and specific administrative determination, contemporaneously made, by the officers charged with the administration of this statute. As far as I can determine, it did not cause a ripple at the time, and it was not seriously questioned in Congress, or elsewhere. Indeed, there was a local court decision confirming it. I do not put much stress on that, but it is a part of the picture which shows that this question was determined in 1933, that it was long regarded as settled, and that many actions were taken in reliance on it.

One of the arguments frequently made by the government is that of the importance of administrative determinations, particularly those contemporaneously made by the officers charged with the administration of the statute involved. This is familiar doctrine in the tax field, and it has long been applied in many other areas of the government. Moreover, there is a further doctrine. Good government requires a substantial measure of stability. There needs to be a basis for reliance on positions taken by responsible administrative officers. Here the position had been outstanding for 34 years before the present suit was filed. Although I make no suggestion that the statute of limitations applies in this case, the usual period of the statute of limitations with respect to real property is 20 years. There is reason behind such provision.

It is said that the action by Secretary Wilbur in February, 1933, was taken in the dying days of the Hoover administration, and therefore, for some reason, is not entitled to great weight. These were, however, the officers who had been responsible for the construction of the Hoover Dam, and who had carried out all of the negotiations under the Boulder Canyon Project Act, and particularly those with respect to the All American Canal. They were the ones

who were then charged with the administration of these statutes. It is hard for me to think of officers who would have been better qualified to know what the appropriate resolution of this problem was. Moreover, they could well have felt that it was not fitting to let such a matter go over to the new administration, since they were directly responsible for it, and had the experience to deal with it.

On this matter, it seems to me significant, too, that no steps were taken by the immediately succeeding administration to upset the determinations made in February, 1933. If there had been serious doubts about this, it seems clear that they would have been raised in the Franklin D. Roosevelt administration. If prompt doubts had been raised, we would not have a long continued administrative construction, and the situation today would be very different. But the initial questions were raised about this only in the mid 1940's, and only with reference to another valley served by the project. Application to the Imperial Valley was soon denied, and no action was taken which directly opposed the conclusion of Secretary Wilbur in the Imperial Valley until the opinion of the Solicitor of Interior on December 31, 1964.

This was more than 31 years after Secretary Wilbur's determination. Whether there was any political motivation in this, I do not regard it as relevant. The significant thing, it seems to me, is that the prior determination had then been outstanding for 31 years, had been widely understood and accepted, and had been extensively relied upon.

8. To me, the essence of this case is essentially a question of good administration of the government. Is it sound to have a government system in which official determinations are made, on questions which are at least debatable, are then outstanding for more than 30 years, and are then decided another way by a succeeding governmental official? This does not strike me as good administration, or good government. Of course, life is filled with uncertainties, in-

cluding commercial life and the ownership of property. But one of the functions of government is to provide for stability and to make it possible for the people to rely on situations which have been determined, and where they make commitments on the basis of that determination.

To me, the controlling factor in this case is the determination of Secretary Wilbur in February, 1933. This was later confirmed by Secretary Krug in 1948. I do not think that it is sound, 38 years later, to be presenting serious questions about that action. Whether it was right or wrong, it was made; and such an administrative determination, on a question at least doubtful should be sustained after a lapse of 38 years.

9. I have given careful consideration to the question whether, agreeing that the underlying questions here are arguable, an appeal should not be authorized simply for the purpose of obtaining a decision of an appellate court on an obviously important matter. Indeed, that would be the easy way out; and it has been tempting. I have given consideration to the question whether I am leaning over backwards. However, I have come to the conclusion that it is not appropriate for me, on this matter, simply to say that it is a doubtful question, and so it should be decided by the court of appeals.

The responsibilities of the Solicitor General cannot be described in a few words. If he authorized appeals in every case where the question was doubtful, a great many more government appeals would be taken than in fact are taken. It is very clear that the Solicitor General is an advocate and not a judge. However, he is a very special sort of advocate. He has a responsibility with respect to government litigation, and he is expected to exercise some control over it, so that cases are not presented simply for the purpose of getting a decision. He has some responsibility in some cases to see that cases are not presented which should not be presented, that cases are not presented where the gov-

ernment's position is, on his best analysis, not one which the government should be interested in.

For the reasons I have already given, this seems to me to be such a case. No matter where I look and turn, I cannot get away from the administrative decision which was made, by officers having responsibility in the area, in February 1933, now 38 years ago. I would not say that it is a breach of faith or a breach of trust for the government to seek to change that decision. I have concluded that, in my judgment, it simply is not good government and that it is not a position which, in the particular circumstances of this case, the United States should be advancing before a court.

In summary, it is not just that I think an appeal to the Ninth Circuit Court of Appeals would be unsuccessful, but that I think that it ought to be unsuccessful. In such circumstances, it does not seem to me appropriate to authorize an appeal.

10. It is clear that there are many defects in the opinion of the district court in this case. It misquotes the statute, and makes other errors. I do not think, though, that these are really very significant. In particular, I do not think that they have the significance which is attached to them in the long memorandum from Mr. Kashiwa. It remains the fact that there is nothing really explicit in the statute, and that the statutory provisions require a good deal of rather involved reading together to support the government's position—a reading together which essentially ignores the special and unusual situation and background of the All American Canal project.

The opinion likewise has some rather sweeping language which might be regarded as having some general effect on the application of the reclamation laws to other projects. It is suggested that there should be an appeal for the purpose of getting this language qualified or disapproved, even if the appeal did not lead to any different result with re-

spect to the Imperial Valley. I am not able to conclude that this is an adequate basis for an appeal. In the first place, these portions of the opinion of the district court are dictum at most, with respect to other projects, and they are rather clearly dictum. I do not think that the precedent will be of any serious moment in subsequent cases involving other areas with different histories and backgrounds. In the second place, I do not think it is appropriate to take an appeal simply for the purpose of getting an opinion limited or corrected, if we think the court reached the right result. Since I think the court here did reach the right result, because of the long continued administrative practice, I do not think that the undue breadth of the opinion is an adequate basis for appeal.

11. In reaching this conclusion, I have sought to consider only the merits of the controversy, and to focus my examination on the responsibilities of this office for the proper handling of government litigation.

For the reasons indicated, however, after full and careful consideration, I have come to the conclusion that there should be no appeal in this case.

ERWIN N. GRISWOLD,
Solicitor General.

APPENDIX B

Letter of Secretary of the Interior Rogers C.B. Morton to Attorney General John N. Mitchell, April 5, 1971 (Congressional Record, February 20, 1980, p. S1632, daily edition).

THE SECRETARY OF THE INTERIOR,
Washington, D.C., April 5, 1971.

Re *United States* v. *Imperial Irrigation District,* Civil No. 67-7-T, U.S.D.C. Southern District of California.

Hon. JOHN N. MITCHELL,

Attorney General of the United States, Department of Justice, Washington, D.C.

DEAR JOHN: I have reviewed the facts and circumstances of the above captioned case as well as the memorandum decision by the United States District Court with my Solicitor, Mitchell Melich. Additionally, we have conferred on the matter with Deputy Attorney General Kleindienst.

They are both of the opinion that an appeal should not be taken in this case and I fully concur with this view. Therefore, I recommend that the United States not appeal the decision of the U.S. District Court, to the U.S. Court of Appeals.

Yours sincerely,

ROGERS C. B. MORTON.

APPENDIX C

Letter of Mitchell Melich, Solicitor, Department of the Interior, to Attorney General John N. Mitchell, April 5, 1971 (Congressional Record, February 20, 1980, p. S1632, daily edition).

U. S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., April 5, 1971.

Re *United States* v. *Imperial Irrigation District*, Civil No. 67-7-T, U.S.D.C. Southern District of California.

Hon. JOHN N. MITCHELL,

Attorney General of the United States, Department of Justice, Washington, D.C.

DEAR MR. ATTORNEY GENERAL: On January 7, 1971, Assistant Attorney General Shiro Kashiwa asked for the Department of the Interior's recommendation for or against an appeal from the United States District Court's judgment entered February 9, 1971, in the subject action, holding that the land limitation provisions of reclamation law do not apply to privately owned lands in Imperial Irrigation District.

I have reviewed the memorandum opinion of Judge Turrentine dated January 5, 1971, and the entire factual background which gave rise to this case. Under the circumstances this Department recommends that an appeal not be taken, of the trial court's decision, to the Ninth Circuit Court of Appeals.

Also, I have reviewed this case with Deputy Attorney Kleindienst and he concurs in this recommendation that no appeal be taken.

Sincerely yours,

MITCHELL MELICH,
Solicitor.

APPENDIX D

Excerpts From Arizona v. California Concerning Satisfaction of Present Perfected Rights

373 U.S. 566-567

"Further, in several places the Act refers to terms contained in the Compact. For example, . . . § 6 requires satisfaction of 'present perfected rights' as used in the Compact.[37] Obviously, therefore, those particular terms, though originally formulated only for the Compact's allocations of water between basins, are incorporated into the Act and are made applicable to the Project Act's allocation among Lower Basin States. The Act also declares that the Secretary of the Interior and the United States in the construction, operation, and maintenance of the dam and other works and in the making of contracts shall be subject to and controlled by the Colorado River Compact."

373 U.S. 566, n. 37

"The dam and reservoir shall be used among other things for 'satisfaction of present perfected rights' in pursuance of Article VIII of said Colorado River Compact."

373 U.S. 581

"[W]e are persuaded that had Congress intended so to fetter the Secretary's discretion [by requiring him to respect the rights of prior appropriators] it would have done so in clear and unequivocal terms as it did in recognizing 'present perfected rights' in § 6."

373 U.S. 582, n. 83

". . . [T]he Senator [Johnson] at another point in the colloquy with Senator Walsh said that he doubted if

the Secretary either would or could disregard Los Angeles and contract with someone having no appropriation. *Ibid.* It is likely, however, that Senator Johnson was talking about present perfected rights, as a few minutes before he had argued that Los Angeles had taken sufficient steps in perfecting its claims to make them protected. See *id.*, at 167. Present perfected rights, as we have observed in the text, are recognized by the Act. § 6."

373 U.S. 583, n. 84

"At one point Senator Hayden seems to say that the Secretary's contracts are to be governed by state law:

" 'The only thing required in this bill is contained in the amendment that I have offered, that there shall be apportioned to each State its share of the water. Then, who shall obtain that water in relative order of priority may be determined by the State courts.' *Ibid.*

"But, in view of the Senator's other statements in the same debate, this remark of a man so knowledgeable in western water law makes sense only if one understands that the 'order of priority' being talked about was the order of present perfected rights—rights which Senator Hayden recognized, see *id.*, at 167, and which the Act preserves in § 6."

373 U.S. 584

"And, as the Master pointed out, Congress set up other standards and placed other significant limitations upon the Secretary's power to distribute the stored waters. It specifically set out in order the purposes for which the Secretary must use the dam and reservoir . . . [here the court quotes from § 6].

373 U.S. 584

"In the construction, operation, and management of the works, the Secretary is subject to the provisions of the reclamation law, except as the Act otherwise provides. § 14. One of the most significant limitations in the Act is that the Secretary is required to satisfy present perfected rights, a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective. § 6."

373 U.S. 588

"Section 18 plainly allows the States to do things not inconsistent with the Project Act or with federal control of the river, for example, regulation of the use of tributary water and protection of present perfected rights."

373 U.S. 594

"It will be time enough for the Courts to intervene when and if the Secretary, in making apportionments or contracts, deviates from the standards Congress has set for him to follow, including his obligation to respect 'present perfected rights' as of the date the Act was passed."

373 U.S. 600

"We follow it [*Winters v. United States,* 207 U.S. 564 (1908)] now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act became effective on June 25, 1929, are 'present perfected rights' and as such are entitled to priority under the Act."

The decree in *Arizona v. California* (376 U.S. 340), contains a number of references to present perfected rights.

376 U.S. 341

"I. For purposes of this decree

* * * * *

"(G) 'Perfected right' means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works . . .;"

376 U.S. 341

"(H) 'Present perfected rights' means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act;"

376 U.S. 341

"II. The United States, its officers, attorneys, agents, and employees be and they are hereby severally enjoined:

"(A) From operating regulatory structures controlled by the United States and from releasing water controlled by the United States other than in accordance with the following order of priority:

"(1) For river regulation, improvement of navigation and flood control;

"(2) For irrigation and domestic uses, including the satisfaction of present perfected rights . . . ."

376 U.S. 342-343

"(B) From releasing water controlled by the United States for irrigation and domestic use in the States of Arizona, California and Nevada, except as follows:

* * * * *

"(3) If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumption use of 7,500,000 acre-feet in the aforesaid three States, then the Secretary of the Interior, after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines and after consultation with the parties to major delivery contracts and such representatives as the respective States may designate, may apportion the amount remaining available for consumptive use in such manner as is consistent with the Boulder Canyon Project Act as interpreted by the opinion of this Court herein, and with other applicable federal statutes, but in no event shall more than 4,400,000 acre-feet be apportioned for use in California including all present perfected rights . . . ."

376 U.S. 344

"[A]nd provided further that nothing herein shall prohibit the United States from making future additional reservations of mainstream water for use in any of such States as may be authorized by law and subject to present perfected rights and rights under contracts theretofore made with water users in such State under Section 5 of the Boulder Canyon Project Act or any other applicable federal statute . . . ."

376 U.S. 346

"Provided, further, that consumptive uses from the mainstream for the benefit of the above-named federal establishments shall, except as necessary to satisfy present perfected rights in the order of their priority dates without regard to state lines, be satisfied only out of water available, as provided in subdivision (B) of this Article, to each State wherein such uses occur . . . ."

439 U.S. 419, 429

"The United States of America, Intervenor, State of Arizona, Complainant, the California Defendants (State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, County of San Diego), and State of Nevada, Intervenor, pursuant to Art VI of the Decree entered in the case on March 9, 1964, at 376 US 340, and amended on February 28, 1966, at 383 US 268, have agreed to the present perfected rights to the use of mainstream water in each State and their priority dates as set forth herein. Therefore, it is hereby ORDERED, ADJUDGED, AND DECREED that the joint motion of the United States, the State of Arizona, the California Defendants, and the State of Nevada to enter a supplemental decree is granted and that said present perfected rights in each State and their priority dates are determined to be as set forth below . . . .

* * * * *

"*The Imperial Irrigation District* in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901."

see
79
421
425